

\*E-Filed 12/22/10\*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DION DAVIS,

No. C 09-04763 RS (PR)

Petitioner,

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

v.

D. G. ADAMS, Warden,

Respondent.

**INTRODUCTION**

This is a federal habeas corpus action filed by a *pro se* state prisoner pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is DENIED.

**BACKGROUND**

In 2006, a Lake County Superior Court jury found petitioner guilty of second degree robbery. Evidence presented at trial establishes that in 2006, petitioner stole \$40 dollars and a box of candy from a customer in a Wal-Mart store. On the evening of February 20, 2006, the victim, a 13-year-old, here named B.C., went to a Clearlake Wal-Mart store. Near the front door of the store, petitioner, a 39-year-old acquaintance of the victim, asked B.C. if he

1 had any money. B.C. said no, and then walked to the electronics department. While he was  
2 there, petitioner again approached B.C., grabbed his arm, and told him to give petitioner  
3 money or petitioner would take B.C.'s jacket and get the money himself. Petitioner also  
4 twice asked the victim to buy him a box of candy which petitioner was holding. After the  
5 victim said, "No," petitioner reached inside the victim's jacket, pulled out \$40, swung the  
6 victim's arm backward and walked off. Though B.C. could not recall on cross-examination  
7 whether he paid for the candy, other witnesses testified that he had in fact purchased the  
8 item. (Ans., Ex. 7 at 2–3.)

9 As grounds for federal habeas relief, petitioner alleges that (1) his robbery conviction  
10 was based on a legally invalid theory, in violation of due process; (2) defense counsel  
11 rendered ineffective assistance; (3) the trial court erred in failing to give jury instructions  
12 regarding unanimity; (4) the trial court failed to give proper instructions regarding reasonable  
13 doubt; and (5) petitioner's sentence constitutes cruel and unusual punishment, in violation of  
14 the Eighth Amendment.

### 15 STANDARD OF REVIEW

16 This court may entertain a petition for writ of habeas corpus "in behalf of a person in  
17 custody pursuant to the judgment of a State court only on the ground that he is in custody in  
18 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).  
19 The petition may not be granted with respect to any claim that was adjudicated on the merits  
20 in state court unless the state court's adjudication of the claim: "(1) resulted in a decision  
21 that was contrary to, or involved an unreasonable application of, clearly established Federal  
22 law, as determined by the Supreme Court of the United States; or (2) resulted in a decision  
23 that was based on an unreasonable determination of the facts in light of the evidence  
24 presented in the State court proceeding." 28 U.S.C. § 2254(d). "Under the 'contrary to'  
25 clause, a federal habeas court may grant the writ if the state court arrives at a conclusion  
26 opposite to that reached by [the Supreme] Court on a question of law or if the state court  
27 decides a case differently than [the] Court has on a set of materially indistinguishable facts."  
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1 *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000).

2 “Under the ‘unreasonable application’ clause, a federal habeas court may grant the  
3 writ if the state court identifies the correct governing legal principle from [the] Court’s  
4 decision but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at  
5 413. “[A] federal habeas court may not issue the writ simply because that court concludes in  
6 its independent judgment that the relevant state-court decision applied clearly established  
7 federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”  
8 *Id.* at 411. A federal habeas court making the “unreasonable application” inquiry should ask  
9 whether the state court’s application of clearly established federal law was “objectively  
10 unreasonable.” *Id.* at 409.

## 11 DISCUSSION

### 12 I. Robbery Conviction

13 Petitioner claims that his robbery conviction is unconstitutional because it was based  
14 on the invalid legal theory that he took candy from the person of the complaining witness.  
15 (Pet. at 11.) That invalidity, according to petitioner, stems from the absence of any evidence  
16 that the witness had actual or constructive possession of the candy, or that it was taken from  
17 his immediate presence. (*Id.*) The state appellate court rejected this claim, concluding that  
18 sufficient evidence existed to support a finding that the victim had possession of the candy  
19 and that it was taken from his immediate presence:

20 having paid for the candy, the victim was its owner and therefore had  
21 possession of it . . . The candy was then taken by [petitioner] either from the  
22 counter or the bag on the counter, both of which were areas so within the  
23 victim’s “reach, inspection, observation or control, that he could, if not  
overcome by violence, or prevented by fear, retain his possession of it.”  
[Citation and quotation marks omitted.] Therefore, at the point the candy was  
taken, it was in the victim’s immediate presence.

24 (Ans., Ex. 7 at 6.)

25 A federal court reviewing collaterally a state court conviction does not determine on  
26 its own if the evidence established guilt beyond a reasonable doubt. *Payne v. Borg*, 982 F.2d  
27 335, 338 (9th Cir. 1992). The federal court “determines only whether, ‘after viewing the  
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1 evidence in the light most favorable to the prosecution, any rational trier of fact could have  
2 found the essential elements of the crime beyond a reasonable doubt.” *See id.* (quoting  
3 *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Only if not may the writ be granted. *See*  
4 *Jackson*, 443 U.S. at 324.

5 Robbery, under California law, is “the felonious taking of personal property in the  
6 possession of another, from his person or immediate presence, and against his will,  
7 accomplished by means of force or fear.” Cal. Pen. Code § 211 . The elements of robbery  
8 relevant in the instant matter are “possession” and “immediate presence.” “Possession”  
9 exists if the victim “owns the property taken, has actual possession of it, or acts in some  
10 representative capacity with respect to the owner of the property.” (Ans., Ex. 7 at 5.)  
11 “Immediate presence” is “an area over which the victim, at the time force or fear was  
12 employed, could be said to exercise some physical control over his property.” (*Id.*)

13 Under these legal principles, petitioner has not shown that he is entitled to habeas  
14 relief on this claim. Sufficient evidence exists in the record to support the jury’s findings that  
15 petitioner took the personal property of the victim (the candy), against his will, and in his  
16 immediate presence. According to the state appellate court, the victim, having paid for the  
17 candy, had possession of the property, which was therefore taken from his presence. Not  
18 only must this Court defer to the state court’s legal definitions of “possession” and  
19 “immediate presence,” *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005), the record supports a  
20 conclusion that a rational trier of fact could have found the elements of robbery true beyond a  
21 reasonable doubt.

22 Petitioner also contends that his robbery conviction is constitutionally invalid because  
23 the jury was not instructed on the meaning of “possession” and “immediate presence.” (Pet.  
24 at 6.) The state appellate court rejected this claim, concluding that “possession” and  
25 “immediate presence” needed no clarification as they are words commonly understood and  
26 were not used in a technical or legal sense. (Ans., Ex. 7 at 9–10.) Whether a term in a jury  
27 instruction requires definition depends on whether the term expresses a concept within the  
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1 jury's ordinary experience. *United States v. Tirouda*, 394 F.3d 683, 689 (9th Cir. 2005) (no  
2 error resulting from failure to define "accomplice" in an accomplice instruction). The record  
3 shows that "possession" and "immediate presence" were not used in any specialized  
4 technical or legal sense, but rather were used at trial with their everyday, commonsense  
5 meanings, and therefore were within a jury's ordinary experience. A jury would presumably  
6 understand that a person possessed candy by having purchased it, and that it was in his  
7 immediate presence when it was on his person or within easy reach. Petitioner's claim is,  
8 therefore, DENIED.

## 9 **II. Assistance of Counsel**

10 Petitioner claims that defense counsel rendered ineffective assistance when he failed  
11 to object to the allegedly erroneous legal theory discussed in the previous claims. (Pet. at 8.)  
12 The state appellate court did not address this claim in its written opinion.

13 Claims of ineffective assistance of counsel are examined under *Strickland v.*  
14 *Washington*, 466 U.S. 668 (1984). In order to prevail on a claim of ineffectiveness of  
15 counsel, a petitioner must establish (1) that counsel's performance was deficient, i.e., that it  
16 fell below an "objective standard of reasonableness" under prevailing professional norms, *id.*  
17 at 687–68, and (2) that he was prejudiced by counsel's deficient performance, i.e., that "there  
18 is a reasonable probability that, but for counsel's unprofessional errors, the result of the  
19 proceeding would have been different." *Id.* at 694. A reasonable probability is a probability  
20 sufficient to undermine confidence in the outcome. *Id.* Where the defendant is challenging  
21 his conviction, the appropriate question is "whether there is a reasonable probability that,  
22 absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at  
23 695.

24 Petitioner's claim is without merit. As the legal theory was not erroneous, defense  
25 counsel's alleged failure to object cannot have caused petitioner to suffer prejudice. It is  
26 both reasonable and not prejudicial for an attorney to forego a meritless objection. *See Juan*  
27 *H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005). Accordingly, petitioner's claim is  
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1 DENIED.

2 **III. Unanimity Instruction**

3 Petitioner claims that the trial court violated his right to due process when it failed to  
4 give a unanimity instruction. (Pet. at 10.) Without such an instruction, petitioner asserts, it is  
5 possible that not all jurors used the same legal theory in concluding that petitioner was guilty  
6 of robbery, thereby depriving petitioner of his right to a unanimous jury verdict. The state  
7 appellate court rejected this claim on grounds that petitioner's acts — taking the victim's  
8 money and candy — “were so related in time and place as to be an indivisible transaction for  
9 which he was criminally responsible” and thus no unanimity instruction was required. (Ans.,  
10 Ex. 7 at 12.)

11 Petitioner is not entitled to habeas relief on this claim. Due process does not require  
12 that the jury agree as to the specific acts that constituted commission of the crimes charged.  
13 The Supreme Court has held that “different jurors may be persuaded by different pieces of  
14 evidence, even when they agree upon the bottom line. Plainly there is no general  
15 requirement that the jury reach agreement on the preliminary factual issues which underlie  
16 the verdict.” *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackman, J, concurring);  
17 *see also Schad v. Arizona*, 501 U.S. 624, 631–32 (1991) (rule that jurors not required to agree  
18 upon single means of commission of crime, citing *McKoy*, applies equally to contention they  
19 must agree on one of the alternative means of satisfying mental state element of crime). This  
20 claim, therefore, is DENIED.

21 **IV. Reasonable Doubt Instruction**

22 Petitioner claims that the trial court violated his right to due process by failing to  
23 instruct the jury as to the application of the reasonable doubt standard between the greater  
24 offense of robbery and the lesser offenses of grand and petty theft. (Pet. at 19.) According to  
25 petitioner, the trial court should have instructed the jury that it could convict petitioner of  
26 only one of those charges and that it must give the benefit of the doubt to the lesser offense.

(*Id.*) The state appellate court rejected this *Dewberry*<sup>1</sup> claim on grounds that, owing to the strength of the prosecution's case, it was unlikely that petitioner would have obtained a more favorable result had the jury received a "*Dewberry*" instruction. (Ans., Ex. 7 at 15.)

Petitioner's claim is not cognizable on federal habeas review. A challenge to a jury instruction solely as an error under state law, such as the state court decision in *Dewberry*, does not state a claim cognizable in federal habeas corpus proceedings. *Estelle v. McGuire*, 502 U.S. 62, 67–68, 71–72 (1991) (federal habeas corpus relief is not available for violations of state law or for alleged error in the interpretation or application of state law). Under limited circumstances, a state statute may create a "liberty interest" protected by the federal right to due process that is enforceable in federal habeas corpus. *See Bonin v. Calderon*, 59 F.3d 815, 841 (9th Cir. 1995). Petitioner does not assert that any state statute entitles him to have a trial court give the instruction outlined in *Dewberry*. In any event, if the state permits its appellate courts to cure the deprivation of state law, as the state appellate court could do if an error had occurred, any state-created right constitutes at most a "qualified" liberty interest. *Arreguin v. Prunty*, 208 F.3d 835, 837–47 (9th Cir. 2000) (citing *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990)). Here, the state appellate court's finding that the instruction under *Dewberry* was unnecessary in light of the strength of the evidence against petitioner satisfied any qualified liberty interest petitioner may have had in the instruction. *See id.* at 837 (state appellate court's application of a harmless error analysis sufficient to satisfy the standard for state-created qualified liberty interests under *Clemons*). Accordingly, the claim is DENIED.

## V. Sentence

Petitioner claims that his sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments because during the sentencing phase the trial court failed to

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<sup>1</sup> *People v. Dewberry*, 51 Cal. 2d 548, 557 (Cal. 1959), held that "the failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder."



1 exercise its discretion to strike two of his prior convictions in the furtherance of justice under  
 2 *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 507, 530 (Cal. 1996). The state  
 3 appellate court rejected this claim on grounds that the trial court properly exercised its  
 4 *Romero* discretion. (Ans., Ex. 7 at 17–18.) Petitioner received a sentence of 38 years-to-life.  
 5 (*Id.* at 1 n.2.)

6 Under *Romero*, a California sentencing court may strike a prior felony conviction  
 7 allegation “in furtherance of justice”; an “amorphous concept” requiring the trial court to  
 8 consider both “the rights of the defendant and the interests of society as represented by the  
 9 People.” *Romero*, 13 Cal. 4th at 507, 530. State sentencing courts must be accorded wide  
 10 latitude in their decisions as to punishment. *See Walker v. Endell*, 850 F.2d 470, 476 (9th  
 11 Cir. 1987). Federal habeas relief is not justified even if a state court misapplies its own  
 12 sentencing laws, unless there is a showing of fundamental unfairness. *Christian v. Rhode*, 41  
 13 F.3d 461, 469 (9th Cir. 1994). Because of a tradition of deferring to state legislatures on  
 14 state sentencing policy, a federal court may not review a state sentence that is within  
 15 statutory limits. *Ewing v. California*, 538 U.S. 11, 24 (2003). While there are limited  
 16 exceptions to this rule of deference under the Due Process Clause<sup>2</sup> and the Eighth  
 17 Amendment, as petitioner has not made a due process claim, only Eighth Amendment  
 18 jurisprudence is relevant here.

19 A criminal sentence that is not proportionate to the crime for which the defendant was  
 20 convicted violates the Eighth Amendment. *Solem v. Helm*, 463 U.S. 277, 303 (1983). Yet  
 21 “outside the context of capital punishment, successful challenges to the proportionality of  
 22 particular sentences will be exceedingly rare.” *Id.* at 289–90. Eighth Amendment  
 23 jurisprudence “gives legislatures broad discretion to fashion a sentence that fits within the

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 25 <sup>2</sup> A federal court may grant relief from a state sentence imposed in violation of due  
 26 process; for example, if a state trial judge imposed a sentence in excess of state law, *see Walker*,  
 27 850 F.2d at 476, or enhanced a sentence based on materially false or unreliable information or  
 based on a conviction infected by constitutional error, *see U.S. v. Hanna*, 49 F.3d 572, 577 (9th  
 Cir. 1995).



1 scope of the proportionality principle - the precise contours of which are unclear.” *Lockyer*  
2 *v. Andrade*, 538 U.S. 63, 76 (2003) (internal quotations and citations omitted). “The Eighth  
3 Amendment does not require strict proportionality between crime and sentence. Rather, it  
4 forbids only extreme sentences that are “grossly disproportionate” to the crime.” *Ewing*, 538  
5 U.S. at 23 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J .,  
6 concurring)). Where it cannot be said as a threshold matter that the crime committed and the  
7 sentence imposed are grossly disproportionate, it is not appropriate to engage in a  
8 comparative analysis of the sentence received by the defendant to those received by other  
9 defendants for other crimes. See *U.S. v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998).

10 In *Harmelin*, the Supreme Court upheld a life sentence without the possibility of  
11 parole for an offender who had no prior felony convictions and whose sole conviction was  
12 for possessing 672 grams of cocaine. 501 U.S. at 995, 961. In *Andrade*, the Supreme Court,  
13 under the highly deferential AEDPA standard, upheld a sentence of two consecutive 25 year  
14 terms for the nonviolent theft of \$150 worth of videotapes. 538 U.S. at 77.

15 Applying these legal precedents, petitioner’s claim cannot succeed. First, a federal  
16 court cannot grant a habeas writ for violations of state law or for alleged error in the  
17 interpretation or application of state law. *Estelle*, 502 U.S. at 67–68 (1991). Though *Romero*  
18 and the California sentencing rules create rights under state law, petitioner has not shown that  
19 they create federal constitutional rights. Second, *Romero*’s “in furtherance of justice”  
20 standard represents an “amorphous concept” which renders it problematic for a federal court  
21 to evaluate petitioner’s claim on the merits. Specifically, for this federal court to assess  
22 whether the trial court violated petitioner’s rights under *Romero*, it would have to consider  
23 rights and interests particular to California’s system of justice, a task rightfully assigned by  
24 the state to its trial courts. Third, petitioner has not shown that his sentence was grossly  
25 disproportionate to his crimes, especially considering that in *Harmelin*, the Supreme Court  
26 upheld as constitutional a life sentence for a nonviolent drug possession crime, and in  
27 *Andrade*, upheld a 50 year sentence under a recidivist statute for a nonviolent theft crime,  
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1 similar to the one committed by petitioner, and for which he received 38, not 50, years. If a  
2 life sentence for a nonviolent drug possession crime is found not to violate the Eighth  
3 Amendment, a state court's affirmation of petitioner's 38 year sentence similarly will not rise  
4 to that level. Accordingly, petitioner's claim is DENIED.

### 5 CONCLUSION

6 The state court's adjudication of petitioner's claims did not result in a decision that  
7 was contrary to, or involved an unreasonable application of, clearly established federal law,  
8 nor did it result in a decision that was based on an unreasonable determination of the facts in  
9 light of the evidence presented in the state court proceeding. Accordingly, the petition is  
10 DENIED.

11 A certificate of appealability will not issue. Reasonable jurists would not "find the  
12 district court's assessment of the constitutional claims debatable or wrong." *Slack v.*  
13 *McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from  
14 the Court of Appeals. The Clerk shall enter judgment in favor of respondent and close the  
15 file.

16 **IT IS SO ORDERED.**

17 DATED: December 22, 2010

  
18 RICHARD SEEBORG  
19 United States District Judge  
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